IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.54 of 1995
With
INCOME TAX REFERENCE No.226 of 1994

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA **Sd/-**

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
LAXMI CEMENT DISTRIBUTORS PVT.LTD. - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/11/2005
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. In Income Tax Reference No.226 of 1994, the following question has been referred by Income Tax Appellate Tribunal, Ahmedabad Bench 'C' under Section 256(1) of the Income-tax Act, 1961 (the Act) at the instance of the Revenue:

> “Whether on the facts and in the circumstances of the case, the Tribunal was right in cancelling the order of the C.I.T. under sec. 263 of the Act?”

2. While in Income Tax Reference No.54 of 1995, the following question has been referred:

> “Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the commission etc. paid to sales organisers was not caught by the mischief of sec.37(3A)/37(3B)?”

3. The Tribunal has passed consolidated order and hence, both the references are taken up for hearing together. The Assessment Year is 1985-86 in both the references.

4. The Commissioner of Income-tax (Commissioner of Income-tax), Rajkot initiated revisional proceedings under Section 263 of the Act and

passed an order on 15th March, 1989 holding that original assessment order was erroneous and prejudicial to the interests of the Revenue on the question of applicability of Section 37(3B) of the Act. The assessee challenged the same before the Tribunal.

5. When the appeal came up for hearing before the Tribunal, the assessment in the second round had been framed and hence, the controversy on merits was also before the Tribunal by way of departmental appeal.

6. The Tribunal vide its order dated 18th October, 1993 allowed the assessee's appeal against order under Section 263 of the Act and dismissed the departmental appeal on merits. On going through the impugned order of the Tribunal, it is apparent that it has recorded various findings of fact after appreciating the evidence on record and in the circumstances, in absence of any question of law, the Court is not bound to answer the reference made by the Tribunal. The references are, therefore, returned unanswered.

7. Before parting it is necessary to take note of the fact that the Tribunal has, unfortunately, proceeded in a wrong manner by putting cart before horse as can be seen from its own observations in the opening portion of Paragraph No.3 of the impugned order which reads as under:

> "3. Though Chronologically order u/s.263 and appeal to the Tribunal against that order come first, it would be better, for the facility of exposition, first to consider and decide the department's appeal which is on merits. ....."

8. In the result, both the references are left unanswered and stand disposed of accordingly.

9. Registry to place a copy of this order in connected matter.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**